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## A REVIEW OF CLASS ACTION DECISIONS IN ALL AREAS OF THE LAW

# Class Action Reports™

If Congress really wanted to reform class action proceedings, it would require a Final Report to be filed in each federal class action detailing (1) the total money paid out by defendants, including whether those costs are paid by the defendant on top of damages or are deducted from the class fund before distribution to class members, and (2) the amount of that total recovery consumed by attorney fees and expenses. These figures would include attorney fees and expenses, litigation costs incurred after the main fees are awarded. Also included would be the amount of the claims made if it is a claims made settlement and the redemption rate and thus the cost to defendant of any coupons issued. Also before the Final Report, settlement proceeds would be settled among the parties to reflect the best estimates of the potential trial outcome vs. the settlement amount. The latter provides for discovery and settlement notices should remand proceedings and settlement amounts of the potential trial occur.

On March 27, 2003 the Supreme Court approved and sent to Congress the latest round of amendments to Rule 23, which we previously published at 23 Class Action Rep. 502 (2002). Except for the unlikely event that Congress affirms all the amendments eventually voted on December 1, 2003, they will take effect on December 1, 2003.

Also moving through Congress is the "Class Action Fairness Act," which would remove most class actions from state to federal courts, which are now largely packed (especially the appeals courts) with Republican judges appointed by Reagan-Bush who generally take a jaundiced eye toward class actions in particular and plaintiffiffs in general. As we have noted before (see 23 Class Action Rep. 149 (2002)), the handful of so-called "runaway" state court judges (who would certainly any class action have already been or soon will be reversed and controlled by appellate and state supreme court decisions in such states as Alabama, Texas, Louisiana, and Illinois, whose Supreme Courts are not exactly populated by radical pro-plaintiff popu-

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• Total costs may be modestly understated to the extent that in some cases we do not have full information on post-settlement notice and claims administration costs later deducted from the common fund prior to its disbursement to class members. In some other cases for which this data is lacking, these expenses are paid by the defendants on top of the settlement fund.

This survey does not cover any awards before approximately 19 1/4, when fees were usually based on a percentage of the recovery, and data on attorney hours and hourly rates were typically unavailable. Some of these pre-1978 awards are discussed at 5 *Class Action Rep.* 334-344, 472-480 (1978).

<sup>3</sup> To the left of each case name in the main Table 1 is a symbol indicating the type of case.  $S$  = securities,  $E$  = employee discrimination,  $L$  = labor/wage/pension,  $B$  = benefit,  $D$  = derivative,  $G$  = gender,  $C$  = consumer,  $M$  = mass tort,  $T$  = taxpaid,  $W$  = social welfare/entitlements,  $U$  = utilities,  $P$  = particular pollution,  $C_P$  = civil rights,  $W$  = environmental regulation. The data for these particular types of cases are separately broken down later in Table 2 (see p. 1996).

*13 Class Action Rep.* 249 (1990).

**Case Information** compiled by **Statistician Dr. Jack Moshman, Moschman Associates, Inc.**, Bethesda, Md.

As can be seen, for every dollar recovered in a common fund class action, 18.4 cents goes to the attorneys and for other costs (expert fees, out-of-pocket expenses, etc.), and 81.6 cents goes to the class members which should seem to be a pretty good deal for class members relative to paying, say, 40% to an individual personal injury lawyer. A comparison with our 1990 study, limited to antitrust and securities class actions, shows the following:

Recovery Range (\$ millions)	No. of Cases	Average Case Recovery (\$ millions)	Fees as %	Atty Hrs.	Multipier	Current Hourly Rate (\$ 2/03 \$)
≤ \$100m	64	28,424.575	15.1	1,940,902	4.50	1,396.21
\$75 - ≤ \$100m	26	2,232.434	20.9	450,753	3.93	1,182.15
\$50 - < \$75m	37	2,168,715	23.6	692,429	2.75	803.40
\$30 - < \$50m	67	2,149.418	24.8	495,482	2.32	679.71
\$20 - < \$30m	65	1,586,256	25.8	353,296	1.90	560.06
\$10 - < \$20m	153	2,171,199	27.9	678,910	1.97	554.53
\$5 - < \$10m	217	1,478,543	30.4	568,985	1.89	513.39
\$3 - < \$5m	142	542,235	31.6	274,591	1.83	498.28
\$2 - < \$3m	98	232,777	30.5	103,495	1.63	489.90
\$1 - < \$2m	123	172,466	31.9	105,740	1.25	356.27
< \$1m	128	69,272	31.4	95,427	1.10	300.22
All Cases	1,120	41,574.841	18.4	5,760,011	3.89	1,192.43

In 1990 we published an extensive survey of fee awards in securities actions.<sup>2</sup> That analysis included 404 cases, representing class recoveries of \$6.3 billion for more than 2.5 million hours for which the fees were awarded. Since then, we have reported fee award data for individual cases in § 50 of each issue. Now we have an updated Survey which, unlike the 1990 Survey, includes consumer, labor, mass tort, and other types of class actions as well as securities and antitrust cases.<sup>3</sup> The new Survey is much larger—1,120 cases, representing class recoveries of about \$4.1 billion for more than 5.7 million hours—although we do not have hours for cases actually accounting for 60% of the total recoveries and 65% of the fees awarded, due to the present dominance of the percentage method for awarding fees, where no hours are reported. The data for each case is summarized in Table I (pp. 169-193) and is suitable for each class recovery size range as follows:

## 1. Introduction and Methodology

ATTORNEY FEE AWARDS IN COMMON FUND CLASS ACTIONS<sup>1</sup>

6 Class Action Rep. 82 (1980).

The 2003 Survey does confirm what the 1980 and 1990 Surveys found—that hourly rates and multipliers tend on average to increase with the size of the class recovered (though there is extreme variability in individual cases). The percentage of the class recovered by attorney fees and expenses tends to increase with the size of the class recovered (though the overall fee percentage is 15.1% for recoveries in Group I (\$100 million and over), as compared with the 18.4% figure for the entire sample, illustrates how a relatively few "big cases" dominate the entire sample. Just 13 cases in which recoveries were over \$400 million account for nearly half of the total \$41.6 billion recovered in all 1,120 cases and 36% of the total fees awarded.

That the overall fee percentage is 15.1% for recoveries in Group I (\$100 million and over), as compared with the 18.4% figure for the entire sample, illustrates how a relatively few "big cases" dominate the entire sample, has been taken to include all fees awards we have been able to find and analyze thus far, those involving low as well as high percentages, hourly rates, and multipliers. This is not a "selective" Survey aimed at pleased either plaintiffs or defendants. Table I follows and combines all of the cases into a single sample ordered by the size of the class recovered. A more detailed explanation of the data in Table I follows.

	No. of Cases	Average Recovered Fees as % of Class Recoveries (\$ millions)	Costs as % of Class Recoveries (\$ millions)	Atty Hrs.	Multiplier	Current Hourly Rate (in 2/03 \$)	1990 Sample
2003 Sample	1,120	41,574.841	18.4	5,760.011	3.89	1,192.43	404
							6,322.658 2,515.642 1.83 494.26